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No. 83-7098

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ALEXANDER L. STEVENS

CLERK

In the
Supreme Court of the United States.

DECEMBER TERM, 1983

TILLIE MOORE,
PETITIONER,

vs.

BUFFALO BOARD OF EDUCATION,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK.

Appendix for a Writ of Certiorari to the
United States Court of Appeals for the First Circuit.

Tillie H. Moore
Plaintiff-Petitioner
Acting Pro Se
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Please note:

This appendix contains the Judgement sought to be reviewed hereby was both rendered and filed by the Federal Second Circuit Court of Appeals on September 16, 1983.

Respectfully Submitted,

Tillie M. Moore
Plaintiff-Petitioner
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Appendix

HONORABLE JOHN T. CURTIN
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK
BUFFALO, NY

TILLIE MOORE,

Plaintiff,

-vs-

CIV-80-424C

BUFFALO BOARD OF EDUCATION,

Defendant.

Filed March 3, 1983

No. 83-7096

Plaintiff Tillie Moore was hired by the Buffalo Board of Education on October 8, 1976. On January 26, 1977, she filed a complaint with the State Division of Human Rights, charging defendant with racially discriminatory employment practice. In this case, she alleges that she was dismissed on May 25, 1977, in retaliation for filing the January complaint. The court has jurisdiction of this case under 28 U.S.C. 1343; Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000(e), et seq., as amended; 42 U.S.C. 1983.

Trial was held on August 13, 1982. Plaintiff testified as the only witness in her behalf. Edgar DeGaspar, Director of Food Service for the defendant, and Ann McGurk both testified for the defendant. The parties had entered into a stipulation of facts (Docket Item 6) and, after trial, submitted post-trial briefs. The

court listened to summations from the attorneys for the respective parties, and the following constitutes the findings of fact and conclusions of law.

Plaintiff, a food service worker, had been previously employed by the Buffalo Board of Education [the Board] for several school years. She did not work during the summer months. On October 8, 1976, when it appeared that there might be an increase in the number of school lunches being served at the new food service facility at Public School #45, Mrs. Moore was rehired. At that time, Ann McGurk, who was the cafeteria manager there, had seven or eight food service helpers, of whom two were black (one of them the plaintiff). Mrs. Moore continued to work at School 45 for the remainder of 1976 and through 1977, until she was terminated in late May of 1977. As previously related,

she had filed a complaint with the State Division of Human Rights on January 26, 1977.

On May 25, 1977, Mr. DeGasper visited the cafeteria at Public School #45. He testified that he talked to the plaintiff as well as the cafeteria manager at that time and told plaintiff that this would be her last week at the school because the volume of the operation at the cafeteria had decreased to the point where her services were no longer needed. He testified that he did not use the word "fired" and further, based upon his years of experience on the Board, when someone's services are no longer needed at a particular school because of a drop in business, the policy of the Board is to put such a person back on a list for re-assignment to another school when an opening develops.

Defense argued that Mrs. Moore in fact resigned. Defendant based this argument on the fact that on the following day, May 26, 1977, Mrs. Moore called Mrs. McGurk on the telephone and told her that she would not return. However, because of the stipulation of facts which was freely entered into by the defendant, the court will not accept the argument of the defendant and hereby finds that the employment of Tillie Moore was terminated on May 25, 1977 (see Docket Item 6, |22).

After May 25, 1977, Mr. DeGasper received inquiries from prospective employers of the plaintiff, and he gave her a favorable recommendation.

In order for plaintiff to establish a claim in this Title VII retaliation suit, plaintiff must show:

first, protected participation or opposition under Title VII known by the alleged retaliator; second, an employment action or actions dis-

advantaging persons engaged in protected activities; and third, a causal connection between the first two elements, that is, a retaliatory motive playing a part in the adverse employment actions.

Grant v. Bethlehem Steel Corp., 622 F.2d 43, 46 (2d Cir. 1980). In the proceeding before the New York State Division of Human Rights, there was evidence that respondent's supervisors began to keep a constant and in-depth scrutiny of her performance shortly after she filed the complaint, and there was no evidence that a similar record was kept of other employees in the department. Yet, after listening to the testimony of the witnesses in the case and considering all the exhibits of record, I am unable to find any other connection between the filing of the complaint in January and the termination in May. See Ombu v. Children's Television Workshop, 516 F. Supp. 1055, 1059

(S.D.N.Y. 1981). Even giving the plaintiff the benefit of the doubt and finding that there is a prima facie link between the company and the termination, the court finds that the defendant has adequately explained the reason for the termination.

When Mr. DeGasper visited the school in late May of 1977, he found that the number of school lunches had continued to decrease from the high number of lunches in October 1976. For that reason, Mrs. Moore's services were no longer needed. In fact, the number of lunches declined further in June of 1977, when the school year ended.

The court accepts Mr. DeGasper's explanation. He has many years of experience with the Board, and it is his responsibility to attempt to run the food service in a manner fair to the employees but also as economically as possible. Plaintiff has

failed to show that this was a mere pretext. Of 21 employees terminated by the Board, 14 were terminated in May and June of that year. The court has also considered the fact that Mrs. Moore was hired at a new cafeteria center which did not have an established record of employment needs. Collectively, these facts are persuasive of defendant's position that Mrs. Moore was terminated for non-discriminatory reasons.

To sum up, the causal link between the filing of the complaint and the termination is weak at best, but giving the plaintiff the benefit of the doubt, the defendant has adequately explained the reason for the termination, and plaintiff has failed to show that the reason was pretext.

For these reasons, the complaint of plaintiff is dismissed, and the Clerk is

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directed to enter judgment in favor of
defendant dismissing the complaint without
costs.

So ordered.

John T. Curtin
United States District Judge

Dated: December 30, 1982

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Appendix

HONORABLE JOHN T. CURTIN
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK
BUFFALO, NY

TILLIE MOORE,

Plaintiff,

-vs-

CIV-80-424C

BUFFALO BOARD OF EDUCATION,

Defendant.

*Filed March 3, 1983

No. 83-7096

After trial in August of 1982, the court filed a decision and order on December 30, 1982, dismissing plaintiff's complain. Judgment was entered on January 4, 1983.

During trial and post-trial briefing and argument, plaintiff was represented by counsel. After judgment was entered, she then relieved counsel and proceeded pro se. She filed a notice of appeal on January 28, 1983, and, at the same time, filed a motion pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, seeking to set aside the judgment.

By order of February 4, 1983, I set argument on the Rule 60(b)(6) motion for February 28, 1983. The defendant filed a letter reply on February 3, 1983. The court had argument on February 28. The plaintiff, appearing pro se, filed additional papers, Docket Items 20 and 21,

in support of her motion. At that time, I explained to the parties that because a notice of appeal was filed, there was doubt of my jurisdiction. Nevertheless, it appeared to be practical to hear the motion and make a tentative ruling.

At the hearing on February 28, Plaintiff was given the opportunity to make an oral statement in behalf of her position, and I gave leave to defense counsel to file a response if he desired on or before March 7, 1983.

Because of the scheduling order set down by the Court of Appeals, it appeared that a prompt decision should be made on Plaintiff's motion.

I have considered the arguments of Plaintiff carefully. If I have jurisdiction to rule on the motion, the motion is denied. Docket Items 20 and 21 and any written response made by defense counsel

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shall be incorporated in the record on appeal.

So ordered.

John T. Curtin

United States District Judge

Dated: March 3, 1983

Appendix

UNITED STATES COURT OF APPEALS
Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 16th day of September, one thousand nine hundred and eighty-three.

Present:

HONORABLE IRVING R. KAUFMAN,
HONORABLE THOMAS J. MESKILL,
HONORABLE LAWRENCE W. PIERCE,
Circuit Judges,

-----X
TILLIE MOORE,

Plaintiff-Appellant,

-against-

83-7096

BUFFALO BOARD OF EDUCATION,

Defendant-Appellee.

-----X

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Conclusion

I, petitioner Tillie M. Moore, was deprived of the court lever of the fundamental right of fair hearing due to inadequate counsel representatives. This issue was raised by post-trial motion under Rule 60 of the Federal Rules of Civil Procedure.

I am unemployed, a victim of discrimination.

For the reasons set forth above, I, Plaintiff-Appellant, respectfully request that a Writ of Certiorari issue to review the judgment of the United States District Court for the Western District of New York.

Prayer for Relief
Respectfully Submitted,

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